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SUPREME COURT, U.S.

NO. 80-5163

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RUDY RAMOS ESQUIVEL,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the jury selection procedure at Petitioner's trial was in accordance with the standards of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980).

II. Whether Petitioner's trial attorney's failure to object to the excusal of certain veniremen was ineffective assistance of counsel.

III. Whether the absence of an objection to the excusal of certain veniremen and the fact that the State used only 11 of its 15 peremptory challenges waived the error or in the alternative rendered it harmless.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent herein, and in response to the Petition for Writ of Certiorari of Rudy Ramos Esquivel would show the Court the following:

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as Esquivel v. State, 595 S.W.2d 516 (Tex.Crim.App. 1980).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). However, as noted in the reasons for denying the writ, Petitioner has not presented to the Texas Court all of the issues which he presents herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Const., Amend. VI.
2. United States Const., Amend. VIII.
3. United States Const., Amend. XIV.
4. Section 12.31(b), Tex. Penal Code Ann. (1974).

STATEMENT OF FACTS

Petitioner was charged with the June 8, 1978, capital murder of Timothy L. Hearn, a peace officer in the lawful discharge of an official duty. He was appointed counsel on June 9, 1978. Jury selection commenced on July 31, 1978. Testimony began on August 14, 1978. On August 17, 1978, the jury returned a verdict of guilty of the offense of capital murder as charged in the indictment. The jury additionally returned a verdict of yes to all three special issues on August 18, 1978. The trial court then assessed punishment at death in accordance with statute.

Petitioner appealed his conviction to the Texas Court of Criminal Appeals. In that appeal he raised the issue of

jury selection procedures utilized at his trial. He did not however raise ineffective assistance of counsel for failure to make an objection to the excusal of certain veniremen. There was no issue raised as to the sufficiency of the evidence. Petitioner confessed to shooting the deceased and another officer. He also admitted prior convictions for forgery, escape, assault and rape.

SUMMARY OF ARGUMENT

Petitioner has alleged that his death sentence should be overturned for error during the jury selection. He specifically complains of the excusal of venireman Nelson (R. 1154-55) and venireman Guidry (R. 925-35). There was no objection to the excusal of either of these veniremen. Under Texas law, a correct contemporaneous objection is required at the time that the venireman is excused from the jury panel. Boulware v. State, 442 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977). Further, the State exercised only 11 of its 15 statutory peremptory challenges. If the State could exercise a peremptory challenge against a venireman who is excused by an erroneous challenge for cause, the error, if any, should be rendered harmless.

Respondent submits that both veniremen were properly excluded under the guidelines of Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980). Venireman Nelson stated that he had conscientious scruples against the infliction of death and further that his reservations would prevent him from being an impartial juror. Venireman Guidry stated that she did not believe in the death penalty and was strictly opposed to it. On further questioning, she affirmed that she could not "go along with the death penalty." (R. 934).

Petitioner further contends that his counsel was ineffective for not making an objection to the excusal of these two veniremen. This allegation was not presented to the Texas Court of Criminal Appeals; therefore, it is not proper

for review by this Court on petition for certiorari.

REASONS FOR DENYING THE WRIT

I.

THE EXCUSAL OF THE VENIREMEN IN PETITIONER'S TRIAL WAS WITHIN THE GUIDELINES SET FORTH BY ADAMS V. TEXAS, ___ U.S. ___, 100 S.Ct. 2521 (1980) AND WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

Petitioner contends that venireman Max C. Nelson (R. 1154-55) and Anne Guidry (R. 925-35) were excluded in violation of the constitutional standards set forth in Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968). Venireman Nelson stated that his reservations would prevent him from being an impartial juror. When challenged for cause by the State, the defense attorney stated "I have no questions." (R. 1155). The State respectfully contends that venireman Nelson's answer that he would not be an impartial juror was sufficient to exclude him under the guidelines of Adams v. Texas, supra.

Venireman Guidry stated at the beginning of questioning that she was opposed to capital punishment. (R. 925). She further stated that she would automatically vote against capital punishment. (R. 927). On further questioning by Petitioner's counsel, she said that "I believe it would interfer with my answering yes to those three questions, because the outcome, as you're stating it, would be -- if all the jurors said yes to those, then the death penalty would be given. My saying yes to that, is somewhat saying then that I would go along with the death penalty. Where, in fact, I don't." (R. 934). She was then excused. Petitioner's counsel made no objection to her excusal. Since venireman Guidry stated her unequivocal opposition to the the death penalty, she was properly excluded for cause.

II.

PETITIONER'S ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN NOT PRESENTING AN OBJECTION WAS NOT PRESENTED TO THE COURT BELOW.

Since Petitioner did not present this question for consideration to the court below and it was not considered by the court below, it should not be considered on certiorari. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 410 U.S. 351 (1973). Further, a careful analysis of the entire record leaves one with the unmistakeable impression that Petitioner's counsel rendered effective assistance. There is no showing that counsel's failure to object was not a tactical decision rather than ineffective assistance.

III.

THE ERROR, IF ANY, IN THE EXCUSAL OF THE VENIREMEN WAS WAIVED BY COUNSEL'S FAILURE TO OBJECT, OR, IN THE ALTERNATIVE, WAS RENDERED HARMLESS BY THE PRESENCE OF UNUSED PEREMPTORY CHALLENGES.

Trial counsel made no objection to the excusal of either venireman complained of in the petition for certiorari. The Texas Court of Criminal Appeals did not consider the error because of the absence of a correct contemporaneous objection. The same rules of procedural fairness apply in death penalty cases as in other cases. Witherspoon v. Illinois, supra. One such rule is that an objection is necessary to preserve error during voir dire unless there is a reasonable excuse for the failure to object. Boulware v. State, 442 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977). Silent acquiescence constitutes waiver no less than explicit consent. Each is an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Petitioner's trial began eight years after the decision in Witherspoon v. Illinois, supra. His constitutional rights regarding jury selection were well known to counsel, the prosecutor, and the trial judge.

If trial counsel may agree to a challenge, and then claim denial of a well known constitutional right on appeal, counsel can guarantee reversal whenever the jury finds his client guilty. This is the very practice condemned in Davis v. United States, 411 U.S. 233 (1973).

> Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal with the thought that if those hopes did not materialize, the claim could then be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

411 U.S. at 241.

The right involved in the jury selection process is a trial-type right which may be waived by counsel. As stated in Estelle v. Williams, 425 U.S. 501, 512 (1976):

> Under our adversary system, once a defendant has the assistance of the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of the trial judge and counsel in our legal system.

Since Petitioner's counsel should have been aware of the constitutional standards enunciated in Witherspoon v. Illinois, supra, his failure to object at the time of trial should waive the error, if any, in the excusal of the two complained of veniremen.

Further, the State exercised only 11 of its 15 statutory peremptory strikes. It is reasonable to presume that the State would have exercised a peremptory challenge once the challenge for cause was denied. It would be poor strategy indeed for an attorney to not strike a venireman after a challenge for cause in the venireman's presence was denied. In at least three other jurisdictions, the state courts have held that the presence of an unused peremptory challenge renders the error, if any, harmless. Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991 (1978); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472, cert. denied, ___ U.S. ___, 100 S.Ct. 530 (1979); Jones v. State,

243 Ga. 820, 256 S.E.2d 907 (1979), cert. denied, ___ U.S. ___, 100 S.Ct. 437 (1980); State v. George, 346 So.2d 694 (La. 1977); Gall v. Commonwealth, ___ S.W.2d ___ (Ky., No. 79-SC-29-MR, decided Sept. 20, 1980).

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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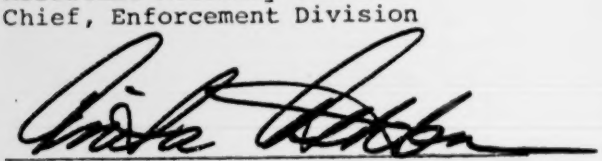

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